STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Cbeyond Communications, LLC	)	
-vs-	)	
Illinois Bell Telephone Company d/b/a	)	
AT&T Illinois	)	
	)	**Docket No. 11-0696**
Formal Complaint and Request for	)	
Declaratory Ruling pursuant to	)	
Sections 13-515 and 10-108 of the	)	
Illinois Public Utilities Act	)	

AT&T ILLINOIS' COMBINED SECTION 2-619.1 MOTION TO DISMISS CBEYOND'S SECOND AMENDED VERIFIED FORMAL COMPLAINT

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I.
Introduction

Illinois Bell Telephone Company ("AT&T Illinois"), by and through its attorneys and pursuant to sections 2-615, 2-619 and 2-619.1 of the Illinois Code of Civil Procedure, hereby moves to dismiss the Second Amended Verified Formal Complaint ("Complaint") of Cbeyond Communications, LLC ("Cbeyond"). Cbeyond filed its latest Complaint in response to ALJ Sainsot's August 31, 2012 ruling (at 6) dismissing Counts I through III of its first amended complaint on the basis that "[t]here simply are not enough facts alleged by Cbeyond in the Amended Complaint or in AT&T Illinois' Motion to Dismiss to make . . . determinations" that those claims were legally sufficient. Cbeyond's latest amended Complaint does not cure the deficiencies pointed out in AT&T Illinois' first two motions to dismiss – indeed, it does not change a single word in Count 1, Count 2, or Count 3 from its first amended complaint. As the complainant, Cbeyond bears the burden of pleading facts sufficient to support its claim. Even with a third chance, Cbeyond still is not able to state a claim, for the reasons explained more fully in the section 2-615 portion of this combined section 2-619.1 motion (*see infra* Section V). In addition, the latest Complaint should also be dismissed based on a variety of affirmative matter, as set forth in the section 2-619 section of this motion (*see infra* Section IV). For the reasons set forth herein, Cbeyond's Complaint should be dismissed in full, with prejudice.

II.
Summary of Argument

The Complaint challenges AT&T Illinois' charges for the provision of Clear Channel Capability ("CCC") on certain circuits. The challenged charges fall into two categories. The first category (which AT&T Illinois will refer to as Category 1 charges) includes CCC charges associated with the "rearrangement" or "grooming" of existing DS1/DS1 enhanced extended

links ("EELs"). The second category (Category 2 charges) includes CCC charges associated with the initial provisioning of new DS1/DS1 EELs. Although the ALJ determined in her August 31 ruling (at 5) that Cbeyond was not challenging AT&T Illinois' Category 1 charges in its (first) amended complaint, Cbeyond's new Complaint makes clear that it is challenging *both* Category 2 *and* Category 1 charges.

Cbeyond's Complaint should be dismissed as to both categories of charges under sections 2-615 and 2-619 of the Illinois Code of Civil Procedure.[1]

Under section 2-619 – which authorizes motions to dismiss based on affirmative matter outside the four corners of the pleading – Cbeyond's Complaint should be dismissed for numerous reasons. *First*, all four counts of Cbeyond's complaint should be dismissed as to the Category 1 charges, because the ALJ has found that the Category 1 charges were not part of the amended complaint, and she did not grant Cbeyond leave to add the Category 1 charges to its Second Amended Complaint. Instead, the ALJ granted Cbeyond leave to clarify the elements of its claims under the Illinois Public Utilities Act ("PUA") (which, as discussed below, Cbeyond failed to do).

Second, even if the ALJ had granted Cbeyond leave to add the Category 1 charges to its complaint, the propriety of the Category 1 charges was already challenged by Cbeyond and ruled upon by this Commission in Docket No. 10-0188. The Commission denied Cbeyond's complaint in full, finding that Cbeyond failed to prove that any of the charges at issue in that docket violated the parties' ICA or the PUA. If Cbeyond was unsatisfied with the Commission's consideration and resolution of the Category 1 charges in Docket No. 10-0188, the proper and

[1] Motions to dismiss under both sections 2-615 and 2-619 of the Illinois Code of Civil Procedure may be filed together in a single motion. 735 ILCS 5/2-619.1. AT&T has divided its arguments in a section 2-615 motion and a section 2-619 motion, with each motion beginning with a discussion of the applicable standard of review. *See infra* Section IV (section 2-619 motion); Section V (section 2-615 motion).

legally required course of action was for Cbeyond to file for rehearing and then, if it was still dissatisfied, file an appeal with the Illinois Appellate Court. Any dispute about the Category 1 charges thus is barred by the collateral attack doctrine. Cbeyond appears to anticipate this argument in its latest Complaint by spending four pages of its new "Introduction" in essence arguing why it should be allowed to challenge both Category 1 and Category 2 charges here. But AT&T Illinois has never argued that the Category 2 charges are barred by the collateral attack doctrine. And regardless of how Cbeyond characterizes the Commission's final order in Docket No. 10-0188, the indisputable facts are that Cbeyond *did* challenge the propriety of the Category 1 charges in Docket No. 10-0188, the Commission denied Cbeyond's complaint in full, and Cbeyond chose not to petition for rehearing from, or to appeal, the Commission's decision. Having failed to do so, Cbeyond is barred by the collateral attack doctrine from challenging the Category 1 charges a second time in this new proceeding.

Third, Counts One, Two and Three of the Complaint should all be dismissed – as to both categories of charges – because Cbeyond's billing dispute must be decided by reference to the parties' ICA, *not* state or federal law. In Counts One, Two and Three, Cbeyond alleges that AT&T Illinois has violated sections 13-514, 13-801 and 9-250 of the PUA, respectively, by charging Cbeyond for CCC when providing DS1/DS1 EELs and when converting Cbeyond's DS1/DS1 EELs to new serving arrangements. All three counts boil down to a single argument: the Category 1 and Category 2 charges AT&T Illinois imposes for CCC are not "cost based." What Cbeyond has repeatedly refused to acknowledge, however, is that regardless of whether rates are cost based, the rates Cbeyond is legally required to pay are those set forth in its ICA. Thus, the central and dispositive issue in this case (which is finally raised by Cbeyond in Count Four) is whether AT&T Illinois' charges are authorized by the parties' ICA – the exclusive

statement of the respective rights and obligations of Cbeyond and AT&T Illinois. The provisions of state law relied upon by Cbeyond are irrelevant to the parties' dispute. The Commission's role is to determine whether AT&T Illinois has complied with the ICA and, if it has not, to order AT&T Illinois to comply. Any attempt to do more would be preempted by federal law.

Fourth, Count Two of the Complaint, for violation of section 13-801(g) of the PUA, is subject to dismissal for another, similar reason: section 13-801 does not apply to carriers – like AT&T Illinois – who are not subject to an alternative form of regulation if the requirements of section 13-801 exceed or are more stringent than the requirements of the Telecommunications Act of 1996 ("1996 Act") and regulations of the Federal Communications Commission ("FCC"). The 1996 Act recognizes that, once parties have entered into a binding ICA, their relationship is then governed directly by the terms and rates set forth in that ICA, not by a state law such as section 13-801(g).

Fifth, although Count Four of the Complaint, for breach of contract, is an appropriate cause of action in a dispute between two parties to an ICA, this count also fails, because it is clear from the plain language of the agreement that AT&T Illinois' charges are authorized by the ICA. AT&T Illinois is not arguing that Cbeyond has not alleged enough facts in its breach of contract claim. Rather, the question to be decided by the Commission in Count Four is whether those alleged facts – assumed to be true for purposes of this motion – are legally sufficient to demonstrate that AT&T Illinois' charges for CCC for new DS1/DS1 EELs are not authorized by the parties' ICA. This is a question of law amenable to a motion to dismiss under section 2-619. The ICA is unambiguous that CCC is an optional feature that the CLEC may request, and sets forth the applicable charge for that feature. Cbeyond also admits that it requested CCC when it

ordered new DS1/DS1 EELs. Thus, pursuant to the express terms of the ICA, AT&T Illinois provided and charged Cbeyond for CCC at the price set forth in the contract. Although Cbeyond claims that AT&T Illinois has violated various general provisions of the ICA by charging Cbeyond for CCC, those general provisions say nothing about the price for CCC and have no relevance to the question before the Commission. Moreover, even if the general provisions were applicable to this case, they must be qualified to the extent made necessary by the specific ICA provisions addressing CCC and its pricing, which specific provisions have been indisputably complied with by AT&T Illinois.

Under section 2-615 of the Code of Civil Procedure – which authorizes motions to dismiss based on defects apparent on the face of the Complaint – Counts One, Two and Three, for violations of sections 13-514, 13-801, and 9-250 of the PUA, respectively, should be dismissed for the same reason they were dismissed on August 31. In its latest amendment, Cbeyond has not added *any* allegations to clarify the "statutory elements [that] are involved in th[ese] statutes and how that relates to Cbeyond" and the facts alleged in the Complaint. 8/30/12 Transcript at 22. Count Two should be dismissed for another reason, as well: while section 13-801 requires interconnection, collocation and network elements to be provided at cost-based rates, Cbeyond's claim is not that AT&T Illinois' CCC charges are something other than cost-based, but rather that those charges are not applicable to the services Cbeyond ordered – an issue that Cbeyond's Complaint recognizes was *not* decided by the Commission in its cost docket (No. 02-0864) setting the rate for CCC.

III.
Background

In 2010, Cbeyond filed a complaint (Docket No. 10-0188[2]) challenging AT&T Illinois' non-recurring charges arising from what Cbeyond called "EEL rearrangements" or "EEL grooming." *See* Ex 2 at 15-16 (Docket No. 10-0188 Complaint).[3] One of the types of charges Cbeyond specifically challenged in that docket was CCC,[4] which was mentioned in no fewer than six places in that complaint (Ex. 2, ¶¶ 30, 34, 35, 36, 37, 38), and discussed at length in the parties' briefs.[5] Like its latest Complaint in this docket, Cbeyond's complaint in Docket No. 10-0188 alleged that AT&T Illinois' charges constituted a breach of the parties' ICA and also violated sections 13-514, 13-801, and 9-250 of the PUA. 220 ILCS 5/13-514, 13-801 & 9-250. After extensive discovery and briefing on the merits, the Commission dismissed Cbeyond's complaint in full, finding that "Cbeyond has not shown that AT&T Illinois has acted improperly in the past with respect to the charges at issue here." Ex. 1 at 33. The Commission also stated: "Now that the dispute has been resolved by the Commission in favor of AT&T, the Commission sees no reason to stop AT&T Illinois from pursuing Cbeyond for the amounts billed." *Id*. at 35. Cbeyond did not move for reconsideration of the final order by the Commission. Nor did Cbeyond file an appeal from the Commission's order.

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[2] The Final Order in Docket No. 10-0188 is attached as Exhibit 1. This Commission may take administrative notice of materials from Docket No. 10-0188, including those materials attached as exhibits hereto. *See* 83 Ill. Admin. Code 200.640(a)(2) (authorizing Commission to take administrative notice of "the orders, transcripts, exhibits, pleadings or any other matter contained in the record of other docketed Commission proceedings").

[3] These grooming projects involved EELs consisting of a DS1 loop and DS1 transport, which Cbeyond wanted to replace either with a DS1 loop combined with DS3 transport or with a DS1 loop connected to transport provided by Cbeyond or a third party. *See* Ex. 1 at 28.

[4] A circuit provisioned with CCC has an increased useable bandwidth for data streaming. Ex. 2 ¶ 15.

[5] *See* Ex. 3 at 23, 28-29 (AT&T Initial Brief); Ex. 4 at 5 (Cbeyond Initial Brief); Ex. 5 at 30, 41-42 (AT&T Reply Brief); Ex. 6 at 20-21, 25-27 (Cbeyond Reply Brief); Ex. 7 at 2, 18-19 (Cbeyond Brief on Exceptions); Ex. 8 at 15-17 (AT&T Response to Exceptions).

Following the release of the final order on July 7, 2011, AT&T Illinois waited for Cbeyond to pay the charges at issue in Docket No. 10-0188. As of August 23, 2011, Cbeyond still had not done so. Therefore, AT&T Illinois sent a letter to Cbeyond stating that AT&T Illinois intended to exercise its contractual right to suspend new ordering and to disconnect service based on Cbeyond's non-payment of the $423,040.59 in charges listed in Exhibit A to the Docket No. 10-0188 Complaint ("Exhibit A").[6] In response, Cbeyond filed suit in Cook County Circuit Court (No. 11 CH 30266) to obtain a temporary restraining order ("TRO") against AT&T Illinois. *See* Ex. 9 (TRO Motion). In the TRO Motion, Cbeyond recognized that "[i]n July, 2011, the Illinois Commerce Commission . . . resolved Cbeyond's principal billing question," which was "whether AT&T improperly imposed disconnection and reconnection fees and charges on Cbeyond." *Id.* ¶ 5. However, according to Cbeyond, "the Commission's ruling did not address . . . the parties' dispute with respect to the accuracy of the amounts billed by AT&T." *Id.* (emphasis by Cbeyond).

Seeking to avoid the expenditure of time and resources needed to litigate a TRO, the parties entered into an "Agreement Regarding Disputed Amounts." Ex. 10 ("Agreement"). In the Agreement, Cbeyond committed to escrow the total amount of the AT&T Illinois charges it disputed, $423,040.59, as set forth in Exhibit A. *Id.* ¶ 1. Cbeyond would then have until September 9, 2011, to "advise AT&T of each specific charge . . . which Cbeyond asserts was not accurately billed (the 'Disputed Charges'), identify all bases for its assertion, and set forth the amount, for each such charge, that it believes should have been billed." *Id.* ¶ 3. If the parties could not fully resolve Cbeyond's disputes concerning the accuracy of the bills, then Cbeyond

[6] Exhibit A was filed by Cbeyond under seal and marked Proprietary, but this dollar amount was mentioned in Cbeyond's publicly filed Motion for a Temporary Restraining Order in the Cook County Circuit Court.

would "bring a complaint proceeding before the Illinois Commerce Commission . . . by no later than October 24[, 2011], unless the parties mutually agree[d] in writing to a later date." *Id.* ¶ 5.

The Agreement made clear that AT&T Illinois was not agreeing that Cbeyond had any right to challenge the billings that were already disputed and considered in Docket No. 10-0188. The Agreement provides, in relevant part: "The parties specifically reserve all arguments they may have with respect to the charges set forth in Exhibit A, and do not, by virtue of anything in this agreement, hereby waive such arguments. The parties specifically acknowledge that AT&T Illinois is not, by this agreement, waiving any arguments it may have that Cbeyond has waived its right to dispute the accuracy of the charges set forth in Exhibit A [to the Complaint in Docket No. 10-0188]." *Id.* ¶ 7.

On September 9, 2011, Cbeyond informed AT&T Illinois that it was not disputing "the accuracy of all billed and withheld loop provisioning and service ordering nonrecurring charges (NRCs) associated with EEL grooming projects that occurred on invoices dated from December 2005 through February 2010 . . . for which it had previously withheld payment" and that Cbeyond would release from escrow $353,690.99. Ex. 11. Cbeyond asserted, however, that it was "disput[ing] the accuracy of all billed clear channel capability ('CCC') NRCs *associated with EEL grooming projects* that occurred on invoices dated from December 2005 through February 2010[.]" *Id.* (emphasis added). Cbeyond did not indicate that CCC charges billed in any context other than those associated with EEL grooming projects were at issue. Nor did AT&T Illinois' September 23, 2011 response to Cbeyond's email mention other charges. *See* Ex. 12.

On October 10, 2011, Cbeyond informed AT&T Illinois by letter that the parties were at an impasse regarding "AT&T's assessment of Clear Channel Capability (CCC) nonrecurring

charges." Ex. 13. The generic language in the letter did not distinguish between the $69,349.60 in CCC charges for EEL rearrangements described in Cbeyond's September 9 email (Category 1 charges) and CCC charges billed in any other context. *See id.*

On October 24, 2011, Cbeyond filed its original complaint in this docket. AT&T Illinois filed a motion to dismiss the complaint, in full, on November 18, 2011. The parties subsequently asked the ALJ to defer ruling on the motion for several months to allow the parties to engage in informal dispute resolution as to the Category 2 charges. Those discussions were unsuccessful and, before the Commission could rule on the motion to dismiss, Cbeyond moved for leave to amend its complaint, which was granted.

In the first amended complaint, Cbeyond challenged CCC charges associated with the initial purchase of DS1/DS1 EELs – the Category 2 charges. AT&T Illinois also read Cbeyond's complaint to possibly include a challenge to CCC charges associated with EEL "grooming" or "rearrangements" – the Category 1 charges that were addressed in Docket No. 10-0188.

AT&T Illinois filed a motion to dismiss the first amended complaint in full, based on numerous defects. AT&T Illinois assumed for purposes of its motion that Cbeyond's first amended complaint challenged both Category 1 and Category 2 charges, because the amended complaint was unclear about the basis of Cbeyond's challenge.

The ALJ granted AT&T Illinois' motion to dismiss the first amended complaint in part. The ALJ agreed with AT&T Illinois that three of Cbeyond's claims – for violations of sections 13-514, 13-801, and 9-250 of the PUA – should be dismissed, finding that the amended complaint did not allege enough facts to allow her to determine whether the claims were legally sufficient. 8/31/12 ALJ Ruling at 6. At the August 30 hearing announcing her ruling, the ALJ explained that she "need[s] to know what statutory elements are involved in th[ese] statutes and

how that relates to Cbeyond." Ex. 14 at 22 (8/30/12 hearing transcript). The ALJ dismissed AT&T Illinois' argument that any challenge to the Category 1 charges was barred by the collateral attack doctrine, solely because she found that Cbeyond's amended complaint "only disput[ed]" the Category 2 charges and did not question "the propriety of what AT&T calls 'Category 1' charges." 8/31/12 ALJ Ruling at 5. Also, the ALJ found that Cbeyond's sole remaining claim, for breach of ICA, "alleged sufficient facts to establish a prima facie case for breach of contract." *Id.* The ruling did not address AT&T Illinois' position that the specific provisions of the ICA that authorize AT&T Illinois' charges control over the general ICA provisions cited by Cbeyond in its first amended complaint. *Id.* at 6.

On October 5, 2012, Cbeyond filed a Second Amended Verified Formal Complaint. That Complaint, like the two preceding it, alleges claims for violations of sections 13-514, 13-801, and 9-250 of the PUA and a claim for breach of ICA. The claims for violations of section 13-514, 13-801 and 9-250 contain the identical allegations as in the first amended complaint, which the ALJ already found were insufficient. Instead of addressing the ALJ's concerns with these claims, Cbeyond added more than four pages to the "Introduction" portion of the Complaint. The Introduction is not in numbered paragraphs, nor is it incorporated by reference in any of the counts of Cbeyond's Complaint. One substantial addition to the Introduction (at 3) is a paragraph in which Cbeyond asserts that it *is* challenging the charges for CCC that AT&T Illinois applies "[w]hen Cbeyond orders new DS1 circuits be (sic) connected to previously installed DS1/DS3 multiplexed, UNE DS3 transport." These are the "Category 1" charges that Cbeyond already challenged in Docket No. 10-0188, and that the ALJ determined in its August 31 ruling were *not* at issue in Cbeyond's amended complaint. 8/31/12 ALJ Ruling at 5. Cbeyond also adds three pages of argument in its Introduction concerning why, in Docket No.

10-0188, the Commission did not decide Cbeyond's challenge to the Category 1 charges (which the Commission actually did decide there) or the Category 2 charges (which AT&T Illinois has never claimed the Commission decided). Complaint at 5-7.

IV.
Section 2-619 Motion to Dismiss

A. Standard of Review

A section 2-619 motion is used "to dispose of issues of law or easily proved issues of fact." *Popp v. O'Neil*, 313 Ill. App. 3d 638, 641 (2d Dist. 2000). *See also* 735 ILCS 5/2-619. Section 2-619 sets forth several specific bases on which a motion to dismiss may be based (*id.* § 2-619(a)(1)-(8)), and a catch-all provision covering "affirmative matter" that warrants dismissal (*id.* § 2-619(a)(9)). A motion asserting the existence of affirmative matter is "a type of defense that either negates an alleged cause of action completely or refutes crucial conclusions of law or conclusions of material fact unsupported by allegations of specific fact contained in or inferred from the complaint." *Krilich v. Am. Nat. Bank & Trust Co. of Chicago*, 334 Ill. App. 3d 563, 570 (2d Dist. 2002).

B. Argument

1. Cbeyond Is Not Entitled To Assert A Challenge To The Category 1 Charges, For Two Reasons.

a. Cbeyond was not granted leave to add the Category 1 charges to the Third Amended Complaint.

All four counts of Cbeyond's Complaint should be dismissed as to the Category 1 charges because Cbeyond was not granted leave to add those charges to its latest Complaint. In the August 31 opinion, the ALJ found that "a reading of the Amended Complaint makes it clear that [Cbeyond] is only disputing Clear Channel Capability rates for situations where the charge is levied on orders for new DS1/EEL circuits," and "[t]herefore, the propriety of what AT&T calls

'Category 1 charges' is not at issue here." 8/31/12 ALJ Ruling at 5. The ALJ then dismissed Counts One, Two and Three of the amended complaint because they did not allege enough facts to allow for a determination of whether the claims were legally sufficient. *Id.* at 6.[7] Cbeyond was granted leave to amend its complaint "in accordance with the specifications stated in the status hearing held on August 30, 2012." 8/30/12 ALJ Ruling at 6. At that status hearing, the ALJ explained that she "need[s] to know what statutory elements are involved in th[ese] statutes and how that relates to Cbeyond." Ex. 14 at 22. There is nothing in the ALJ's ruling or statements at the August 30 status hearing suggesting that Cbeyond was being allowed to add the Category 1 charges to this case.

In short, Cbeyond was not granted leave to file a Second Amended Complaint to add a challenge to the Category 1 charges. "In order to file an amended complaint, the plaintiff must seek and obtain the court's permission." *Moyer v. Southern Illinois Hosp. Service Corp*., 327 Ill. App. 3d 889, 895 (5th Dist. 2002). "Amendments filed without leave of court are said to be a nullity which should be stricken." *Moyer*, 327 Ill. App. 3d at 895. Because Cbeyond did not have leave to add the Category 1 charges, all four counts of Cbeyond's complaint should be dismissed to the extent they are based on the Category 1 charges.

[7] Although the ALJ found that Cbeyond alleged sufficient facts to state a claim for violation of the ICA (8/31/12 ALJ Ruling at 6), that finding was as to the Category 2 charges only because, according to the ALJ, Cbeyond's amended complaint did not challenge the Category 1 charges (*id.* at 5).

b. Even if Cbeyond's addition of the Category 1 charges was authorized – which it was not – Cbeyond's challenge to the Category 1 charges should be dismissed because the Commission already considered and rejected that claim in Docket No. 10-0188, from which Cbeyond chose not to appeal.[8]

The PUA sets forth a clear process by which a party that is dissatisfied with a decision of the Commission can seek relief. First, the party may file a motion for reconsideration with the Commission. If dissatisfied with that outcome, the party may file an appeal to the Illinois Appellate Court within 35 days. *See* 220 ILCS 5/10-201(a). The collateral attack doctrine prohibits a party from circumventing these requirements by allowing a Commission decision to stand unchallenged, and then filing a new complaint asking the Commission to consider the same issue. *See, e.g., Citizens for a Better Env't v. Illinois Wood Energy Partners, L.P.*, Docket No. 92-0274, 1995 WL 17200504, ¶ 1 of Commission Analysis & Conclusions (ICC Nov. 22, 1994) (slip op.) (granting utility's motion to dismiss complaint challenging its facility's classification as a "qualified solid waste energy facility" on the basis that the "complaint is a collateral attack on a duly entered Order to which no appeal was taken" and "[t]he matters raised in the complaint should have been raised in [the earlier] Docket").

Cbeyond recognizes, as it must, that it already "raised the general application of the CCC rate in Docket No. 10-0188 in the context of EEL rearrangements" – *i.e.*, the Category 1 charges – "both in briefing and in exceptions to the Proposed Order." Complaint ¶ 29. Because Cbeyond raised the issue in Docket No. 10-0188, if it was dissatisfied with the Commission's consideration or resolution of the issue, Cbeyond could have sought reconsideration from the

[8] In accordance with the ALJ's August 31 ruling (at 6), AT&T has analyzed whether doctrines of issue preclusion bar Cbeyond's challenge to the Category 2 charges. Although the doctrines of res judicata and collateral estoppel do not apply to orders of the Commission, *see, e.g., In re City of Naperville*, Docket No. 03-0779, 2004 WL 2513556, §§ III.B, IV (ICC Sept. 9, 2004) (slip op.), the Commission does recognize the related collateral attack doctrine, which, as explained in this section, bars Cbeyond's challenge to the Category 1 charges.

Commission and, if still dissatisfied, filed an appeal with the Illinois Appellate Court. Cbeyond did neither, and thus is barred by the collateral attack doctrine from asserting the same argument again. *See, e.g., Albin v. Illinois Commerce Comm'n*, 87 Ill. App. 3d 434, 438 (4th Dist. 1980) (holding that intervenors waived right to challenge Commission's grant of certificate of public convenience and necessity to power company "by their failure to appeal" from the Commission order granting certificate and explaining that order was "not subject to collateral attack" in a subsequent proceeding); *Illini Coach Co. v. Illinois Commerce Comm'n*, 408 Ill. 104, 111-12 (1951) (holding that carrier's complaints filed with Commission, which sought to vacate prior Commission order denying carrier's application for certificate of convenience and necessity and which were filed after statutory times for rehearing and appeal elapsed, constituted improper collateral attacks on the prior order, which the ICC properly refused to hear).

Attempting to avoid this result, Cbeyond spends several pages of its new "Introduction" in essence arguing why the Commission should ignore its prior decision and address the Category 1 charges here. First, Cbeyond characterizes the Category 1 CCC charges as a mere "side-issue" in the previous docket. But that argument is belied by the following:

- According to Cbeyond, the Category 1 charges represented "one-fifth of the amount in controversy" in Docket 10-0188 (Complaint at 6);
- According to Cbeyond, "1,140 clear channel charges [were] at issue in docket 10-0188," all of which related to the Category 1 charges (Complaint at 6);
- In its Docket No. 10-0188 complaint, Cbeyond raised the CCC rate in no fewer than six places[9]; and

[9] Ex. 2, ¶ 35 ("The DS1 Clear Channel Charge is applicable to format a DS1 loop to transmit a clear channel bit stream. When a previously installed DS1 Clear Channel Loop is cross connected to new transport, Illinois Bell does no work to establish or re-establish clear channel on a loop."); ¶ 37 ("There is . . . no provision in the parties interconnection agreement that authorizes Illinois Bell to charge Cbeyond the $70.32 initial or $8.87 additional DS1 Clear Channel installation charges, when Illinois Bell cross connects previously installed loops to new transport[.]"); ¶ 38 ("the $70.32 and $8.87 Clear Channel charges to change the transport portion of an EEL are inappropriate, unlawful and a violation of Cbeyond's Interconnection Agreement"); *see also id.* ¶¶ 30, 34, 36 (also discussing CCC).

- The parties briefed the CCC issue extensively.[10]

Cbeyond also asserts that "[t]he Commission's decision in [Docket No.] 10-0188 did not approve AT&T Illinois' practice of billing the CCC rate on either the specific charges at issue in that docket, or new charges being assessed by AT&T Illinois on DS1 or DS3 transport provisioned since the filing of that complaint." Complaint ¶ 30. But the Commission *did* decide the CCC issue as to the Category 1 charges, and Cbeyond lost, with the Commission concluding that Cbeyond failed to meet its burden to prove that any of the challenged charges – including the CCC charges – were improper.[11] In the Final Order, the Commission described the CCC issue (Ex. 1 at 15, 17, 25, 27) and properly concluded that "Cbeyond has not shown that AT&T has violated the parties' ICA" (*id*. at 29). *See also id.* at 33 ("Cbeyond has not shown that AT&T has acted improperly in the past with respect to the charges at issue here."). The Commission also stated that "[n]ow that this dispute has been resolved by the Commission in favor of AT&T, the Commission sees no reason to stop AT&T from pursuing Cbeyond for the amounts billed." *Id*. at 35. The Commission made no exception, explicitly or implicitly, for CCC charges.

Thus, Cbeyond cannot legitimately claim that CCC charges were not at issue in Docket No. 10-0188 or were not addressed by the Commission's decision. The Commission was not required to discuss Cbeyond's claim about CCC charges in any further detail than it did. As the Commission has explained, "neither the [Public Utilities] Act, the [Illinois] Code, nor case law require[s] the Proposed Order to discuss *every argument of every party on every material issue*."

[10] *See* Ex. 3 at 23, 28-29 (AT&T Initial Brief); Ex. 4 at 5 (Cbeyond Initial Brief); Ex. 5 at 30, 41-42 (AT&T Reply Brief); Ex. 6 at 20-21, 25-27 (Cbeyond Reply Brief); Ex. 7 at 2, 18-19 (Cbeyond Brief on Exceptions); Ex. 8 at 15-17 (AT&T Response to Exceptions).

[11] Contrary to Cbeyond's implication, it was not necessary for the Commission to "approve AT&T Illinois' practice of billing the CCC rate." Complaint ¶ 30. Cbeyond, as the complainant, bore the burden of proving that AT&T Illinois' billing practices violated the ICA. Cbeyond failed to do so, warranting the denial of its complaint.

Commonwealth Edison Co. Proposal to Establish Rate CS, Contract Service, Docket No. 93-0425, 1994 Ill. PUC Lexis 260, at *66, 153 P.U.R. 4th 151 (June 15, 1994) (emphasis added). And as the Appellate Court has made clear, "[t]he Commission is *not required to make particular findings* as to each evidentiary fact or claim, nor is the Commission required to disclose its mental operations." *Abbott Labs., Inc. v. Illinois Commerce Comm'n*, 289 Ill. App. 3d 705, 716 (1st Dist. 1997) (emphasis added).

Cbeyond implies in its Complaint that AT&T Illinois agreed that Cbeyond could reassert arguments that were already raised and rejected in Docket No. 10-0188. Cbeyond alleges that the parties "agreed on August 29, 2011 that any unresolved issues remaining in dispute over billings arising from the 'EEL rearrangements' litigated in ICC Docket No. 10-0188, which the parties could not resolve by negotiation, would be brought to this Commission by Complaint no later than October 24, 2011." Complaint ¶ 32. But Cbeyond misrepresents the parties' Agreement. The parties entered into the Agreement only after Cbeyond refused to pay the charges upheld in AT&T Illinois' favor in Docket No. 10-0188, and sought a TRO in the Cook County Circuit Court to enjoin AT&T Illinois from enforcing its contractual rights under the ICA. In the Agreement, AT&T Illinois made abundantly clear – and Cbeyond acknowledged – that AT&T Illinois was *not* agreeing that Cbeyond had a right to challenge anew the CCC charges that were already considered in Docket No. 10-0188. The Agreement provides, in relevant part: "The parties specifically reserve all arguments they may have with respect to the charges set forth in Exhibit A, and do not, by virtue of anything in this agreement, hereby waive such arguments. *The parties specifically acknowledge that AT&T Illinois is not, by this agreement, waiving any arguments it may have that Cbeyond has waived its right to dispute the accuracy of the charges set forth in Exhibit A.*" Ex. 10, ¶ 7 (emphasis added).

Moreover, even if the Agreement did authorize Cbeyond to further challenge CCC charges related to EEL "rearrangements" – which it does not – the Agreement says only that Cbeyond will identify charges that were "not *accurately billed*." *Id.* ¶ 3 (emphasis added). Cbeyond's complaint does not challenge the accuracy of any of AT&T Illinois' bills.[12] Instead, Cbeyond is challenging the legal and contractual bases for the Category 1 CCC charges. These issues were already brought before the Commission in Docket No. 10-0188. If Cbeyond was unsatisfied with the resolution of the issues there, its remedy was to file an appeal. Cbeyond has no right to relitigate legal arguments already rejected by the Commission.

Finally, as the Commission and its Staff have repeatedly pointed out, Cbeyond could seek to remedy its objection to the imposition of Category 1 charges going forward by negotiating or arbitrating a new ICA with AT&T Illinois. *See* Ex. 1 at 33; Staff Motion to Dismiss Original Complaint at 2. In its final order in Docket No. 10-0188, the Commission noted that it was "baffling . . . why Cbeyond has not sought to amend its contract," which expired over a year and a half ago, in February 2010. Ex. 1 at 33. Cbeyond still has not requested negotiation of a new or amended ICA. Instead, Cbeyond has claimed that negotiating or arbitrating a new ICA would

[12] The only statement in the Complaint that appears to even arguably challenge the accuracy of AT&T Illinois' bills for the Category 1 charges is one sentence in the "Introduction" to the Complaint, in which Cbeyond asserts obliquely that "AT&T did not apply the 'First and Additional' charges correctly – it billed the much higher rate (First) for almost all of the CCC charges – not the 'additional' rate which should have been applied (if applied at all)." Complaint at 7. These charges were already part of the Category 1 charges at issue in Docket No. 10-0188, and thus Cbeyond could and should have brought up this argument in the earlier docket.

In addition, Cbeyond's allegations concerning the "First and Additional" charges are not part of Cbeyond's Complaint. According to the ALJ, "[a]ny further pleadings and motions shall be in conformance with the Illinois Code of Civil Procedure." 8/31/12 Order at 6. Pursuant to that code, "[a]ll pleadings shall contain a plain and concise statement of the pleader's cause of action," and "[e]ach separate cause of action upon which a separate recovery might be had shall be stated in a separate count . . . , shall be separately pleaded, designated and numbered, and each shall be divided into paragraphs numbered consecutively, each paragraph containing, as nearly as may be, a separate allegation." 735 ILCS 5/2-603(b), (c). Cbeyond's statement about the application of "'First and Additional' charges" is in an unnumbered paragraph of the Introduction and is not incorporated by reference into any of Cbeyond's causes of action, and thus is not part of any of Cbeyond's four claims.

be too drawn-out and expensive for Cbeyond.[13] Apparently spending over two and a half years litigating AT&T Illinois' application of the Category 1 CCC charges in two separate complaint proceedings did not cause Cbeyond similar concerns. Regardless, Cbeyond's argument completely ignores that negotiation and arbitration of ICAs is mandated by the 1996 Act. As Staff explained, "[t]he issues that Cbeyond raises in this proceeding and raised in Docket No. 10-0188 are precisely those issues that the [1996 Act] is designed to address through its negotiation and arbitration provisions." Staff Motion to Dismiss Original Complaint at 2.[14]

2. Count Two Of The Complaint – For Violation Of Section 13-801(g) Of The PUA – Should Be Dismissed Because AT&T Illinois Is An Electing Provider That Is Not Subject To Section 13-801 To The Extent The Statute Imposes Obligations That Exceed The Requirements Of The 1996 Act Or The FCC's Regulations.

In Count Two of the Complaint, Cbeyond asserts that AT&T Illinois has violated section 13-801(g) of the PUA because its purported "misapplication of the CCC rate results in it being double-compensated for seven activities it does only once." Complaint ¶ 45.[15] But this statutory provision does not apply to AT&T Illinois under the facts alleged. Section 13-801(a) provides that, to the extent that the provisions of section 13-801 impose requirements or obligations "that exceed or are more stringent than those obligations imposed by section 251 of the federal

[13] Cbeyond Response to Motions to Dismiss Original Complaint at 7-8 (filed Dec. 16, 2011).

[14] *See also In the Matter of the Complaint of McLeodUSA Telecommunications Services, Inc.*, No. 11-3407-TP-CSS, 2011 WL 5023559, ¶ 35 (Ohio P.U.C. Oct. 12, 2011) (explaining that allowing a carrier to challenge its ICA through a complaint proceeding "would undermine the certainty of contractual obligations" and that the proper course for a party dissatisfied with its ICA "is termination of the current interconnection agreement pursuant to the terms of the agreement followed by the negotiation of a successor agreement"). (A copy of the *McLeodUSA* decision is attached hereto as Ex. 15.)

[15] Section 13-801(g) provides: "Cost based rates. Interconnection, collocation, network elements, and operations support systems shall be provided by the incumbent local exchange carrier to requesting telecommunications carriers at cost based rates. The immediate implementation and provisioning of interconnection, collocation, network elements, and operations support systems shall not be delayed due to any lack of determination by the Commission as to the cost based rates. When cost based rates have not been established, within 30 days after the filing of a petition for the setting of interim rates, or after the Commission's own motion, the Commission shall provide for interim rates that shall remain in full force and effect until the cost based rate determination is made, or the interim rate is modified, by the Commission." 220 ILCS 5/13-801(g).

Telecommunications Act of 1996 and regulations promulgated thereunder," such provisions are expressly *not* applicable to a "telecommunications carrier not subject to regulation under an alternative regulation plan pursuant to section 13-506.1 [of the PUA]." 220 ILCS 5/13-801(a). AT&T Illinois is an "Electing Provider" subject to regulation under section 13-506.2 of the PUA, having filed its Notice of Election for Market Regulation on a state-wide basis on June 28, 2010 in accordance with section 13-506.2(b).[16] As a result, AT&T Illinois is not subject to regulation under an alternative regulation plan pursuant to section 13-506.1. *See also* 220 ILCS 5/13-506.2(k) (listing PUA provisions not applicable to Electing Providers, including § 13-506.1).

As explained in detail in the next section of this motion, under the 1996 Act, "once an [interconnection] agreement is approved, the parties thereto are "governed by the interconnection agreement" and "the general duties of [the 1996 Act] no longer apply." *Michigan Bell Tel. Co. v. MCImetro Access Trans. Servs., Inc.*, 323 F.3d 348, 359 (6th Cir. 2003). Because of AT&T Illinois' Electing Provider status, Cbeyond's section 13-801 claim, to the extent it has one, essentially folds into its breach of ICA claim.

3. Counts One Through Three Of The Complaint Should Be Dismissed Because The Parties' Relationship Is Governed By Their Interconnection Agreement, Not State Law.

The first three counts of Cbeyond's Complaint, which all allege violations of provisions of the PUA, are subject to dismissal because the Complaint must be decided, if at all, by reference to the parties' ICA. The provisions of state law relied upon by Cbeyond are irrelevant to the Commission's determination. While AT&T Illinois recognizes that the Commission has jurisdiction to entertain breach of ICA claims, in doing so, the Commission must apply the terms and conditions found in the ICA, not some other, independent source of authority.

[16] *See* Ex. 16 (notice of election).

The relationship between AT&T Illinois and Cbeyond is governed by their ICA, the "Congressionally prescribed vehicle for implementing the substantive rights and obligations set forth" in the 1996 Act. *Michigan Bell Tel. Co. v. Strand*, 305 F.3d 580, 582 (6th Cir. 2003). The 1996 Act's "regime for regulating competition in th[e] [telecommunications] industry is federal in nature . . . and while Congress has chosen to retain a significant role for the state commissions, the scope of that role is measured by federal, not state law." *Southwestern Bell Tel. Co. v. Connect Commc'ns Corp.*, 225 F.3d 942, 946 (8th Cir. 2000). Pursuant to federal law, "the authority granted to state regulatory commissions is confined to the role described in § 252 [of the 1996 Act] – that of arbitrating, approving, and enforcing interconnection agreements." *Pacific Bell v. Pac West Telecomm, Inc*., 325 F.3d 1114, 1126 (9th Cir. 2003).

"Once the terms [of the ICA] are set, either by agreement or arbitration, and the state commission approves the agreement, it becomes a binding contract." *Id.* at 1120. *See also* 47 U.S.C. § 252(a)(1) (carriers may "negotiate and enter into a binding [interconnection] agreement"). Once the ICA is approved, the contracting parties are "regulated directly by the interconnection agreement." *Law Offices of Curtis V. Trinko LLP v. Bell Atl. Corp.*, 305 F.3d 89, 104 (2d Cir. 2002), *rev'd in part on other grounds sub nom., Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004). *See also MCImetro Access*, 323 F.3d at 359 ("once an agreement is approved," the parties are "governed by the interconnection agreement" and "the general duties of [the 1996 Act] no longer apply").

Thus, once the terms of the ICA are set, that document is the exclusive statement of the parties' rights and obligations – and both federal *and* state law operating of their own force are irrelevant. Each party simply must comply with the terms and conditions of the governing ICA. *See, e.g., McLeodUSA*, 2011 WL 5023559, ¶ 34 (Ex. 15) (finding that "AT&T's collocation

charges, even if alleged to be unjust or discriminatory, do not entitle PAETEC to relief through a complaint" proceeding where the charges were authorized by the parties' negotiated ICA); *Goldwasser v. Ameritech Corp*., No. 97 C 6788, 1998 WL 60878, at *11 (N.D. Ill. Feb. 4, 1998) (dismissing claims for violation of sections 251, 252, 271 and 272 of the 1996 Act, because telecommunications company's "duties exist . . . only within the framework of the negotiation/arbitration process which the Act establishes to facilitate the creation of local competition"; explaining that "[i]f there are problems with carriers . . . failing to satisfy the[] duties to their competitors [under §§ 251 and 252 of the 1996 Act], the Act establishes the sole remedy: state PUC arbitration and enforcement proceedings, with review by federal courts"), *aff'd on other grounds,* 222 F.3d 390 (7th Cir. 2000).

This Commission does not have authority – under any provision of federal or state law – to modify the approved, binding ICA between AT&T Illinois and Cbeyond to allow Cbeyond to pay different rates or be subject to different conditions than those set forth in the contract. Simply put, "this Commission cannot take action" that will "effectively change[] the terms of [the] interconnection agreement[]," because that would "contravene[] the Act's mandate that interconnection agreements have the binding force of law." *Pac West Telecomm,* 325 F.3d at 1127. As the Illinois Appellate Court has explained, "[n]othing in the [Illinois Public Utilities] Act, even the independent authority for alternative regulation . . . , gives the Commission the power to controvert federal law." *Illinois Bell Tel. Co. v. Illinois Commerce Comm'n*, 352 Ill. App. 3d 630, 638-39 (3d Dist. 2004) (Commission order that extended wholesale performance remedy plan to CLECs that did not have interconnection agreements with telephone company, as part of alternative regulation plan, was preempted by 1996 Act; access to remedy plan subverted negotiation and arbitration process required by 1996 Act). *See also, e.g., Illinois Bell Tel. Co. v.*

Illinois Commerce Comm'n, 343 Ill. App. 3d 249, 257 (3d Dist. 2003) (tariff that telephone company was ordered to file by the ICC conflicted with federal law regarding interconnection agreements in the 1996 Act; tariff allowed any CLEC that did not have interconnection agreement to opt into the tariff without having to negotiate, mediate, or arbitrate with telephone company, and thus, telephone company lost its right of federal district court review).

Thus, state law is not applicable to the Commission's decision in this case, except to the extent that it provides the general principles of contract law used to interpret the ICA. The Commission need only decide whether AT&T Illinois breached the ICA. To the extent that Cbeyond claims that state law imposes obligations on AT&T Illinois above and beyond, or even contrary to, what the parties agreed to in their ICA, that state law is preempted. The Commission cannot, for instance, exercise its authority under section 9-250 of the PUA to "impose rates, charges and practices that are just and reasonable" to modify an approved, binding ICA. 220 ILCS 5/9-250. *See also, e.g., Wisconsin Bell v. Bie*, 340 F.3d 441, 444 (7th Cir. 2003) (state tariffing requirement, which "interfer[ed] with the procedures established by the [1996] [A]ct" for negotiating and arbitrating interconnection agreements, was preempted); *Illinois Bell Tel. Co. v. Hurley*, No. 05 C 1149, 2008 WL 239149, at *7 (N.D. Ill. Jan. 28, 2008) ("Because § 13-801 requires unbundling of AT&T Illinois' network elements to the Competing Carriers, even in situations in which § 251 of the Act do[es] not require the providing of unbundled access to unimpaired CLECs, . . . the court holds that § 13-801 impermissibly preempts the Act[.]"). Counts One, Two and Three of the Complaint therefore should be dismissed.

4. Count Four Of Cbeyond's Complaint Should Be Dismissed Because It Is Clear From The Face Of The Complaint And The Governing ICA That Cbeyond Ordered CCC Capability And AT&T Illinois Provided It At The Rates Set Forth In The ICA.

As discussed above, the parties' relationship is governed by their ICA, and at its core, this case is nothing more than a breach of contract case. Cbeyond finally asserts its breach of contract claim in its final count. In Count Four, Cbeyond alleges that "AT&T Illinois' misapplication of the CCC rate is a breach of the parties' Interconnection Agreement." Complaint ¶ 53. Although Cbeyond cites to a number of general ICA provisions as purported support for its argument, Cbeyond's Complaint does *not* address the only ICA provisions that are relevant to the Commission's inquiry on the breach of ICA claim: (1) § 9.2.7.7.5 of Schedule 9.2.7 of the ICA, which explicitly and unequivocally provides that CCC is an optional feature that may be ordered by a CLEC for an additional cost; and (2) the Pricing Schedule, which sets forth the specific additional cost for CCC. AT&T Illinois fully complied with these provisions, and the general provisions cited by Cbeyond in its Complaint cannot be used to contradict the specific ICA terms governing CCC.[17]

[17] AT&T Illinois recognizes that the August 31 ALJ Ruling finds that Cbeyond has alleged adequate facts in its breach of contract count to state a claim. In this motion, however, AT&T Illinois challenges Cbeyond's breach of contract claim under section 2-619 of the Illinois Code of Civil Procedure, which can be used to "dispose of issues of law" (*Popp*, 313 Ill. App. 3d at 641) such as the "[i]nterpretation of the terms . . . of any written and unambiguous contract" (*Trans States Airlines v. Pratt & Whitney Canada, Inc.*, 177 Ill. 2d 21, 50 (1997)). The question to be decided by the Commission in Count Four is whether the facts alleged by Cbeyond – assumed to be true for purposes of this motion – are legally sufficient to demonstrate that AT&T Illinois' charges for CCC for new DS1/DS1 EELs are not authorized by the parties' ICA. As AT&T explains in this section, the ICA is unambiguous concerning the CCC rates Cbeyond is required to pay and the ICA provisions cited by Cbeyond are not relevant to this determination.

At the August 30 status hearing, the ALJ recognized that "the beauty" of a dispositive motion, even if it does not resolve an entire case, is that irrelevant allegations may be "pushed away," allowing the parties to "really focus on what they're trying to present as evidence." Ex. 17 at 10-11 (11/3/11 hearing transcript). Here, all of the ICA provisions on which Cbeyond relies can be "pushed away" because they do not support a breach of contract claim. Thus, even if the Commission does not dismiss the claim based on the contract language that makes clear that CCC is an optional feature available at the listed price, it

The ICA is clear regarding CCC. Section 9.2.7.7.5 of Schedule 9.2.7[18] states: "The following *optional features* are available if requested by CLEC, at an additional cost." Ex. 18 at p. 295 of 471 (emphasis added).[19] Section 9.2.7.7.5 then lists "Clear Channel Capability" as one of the optional features. *Id*. The price for optional CCC is set forth in the ICA's Pricing Schedule. *Id.* at pp. 389, 390, 391 of 471 (original pricing schedule) and p. 405 of 471 (02-0864 pricing schedule).

Cbeyond has admitted that it ordered and received circuits with CCC when it ordered new DS1/DS1 EELs from AT&T Illinois. *See* Complaint at 2-3 ("Cbeyond purchases circuits *that are formatted with clear channel capability* from Illinois Bell as Unbundled Network Elements ('UNEs'), as part of a combination of UNEs called a DS1/DS1 Enhanced Extended Loop ('EEL'). . . . When Cbeyond orders new DS1/DS1 EEL circuits designed and formatted with clear channel capability, AT&T Illinois bills Cbeyond the 4-wire DS1 Loop to DS1 Interoffice Dedicated Transport – Collocated provisioning nonrecurring charge and the CCC non-recurring provisioning charge." (emphasis added)).

Because the ICA expressly provides that CCC is an optional feature that Cbeyond may order for an additional cost, and Cbeyond ordered CCC as an optional feature when it purchased DS1/DS1 EELs from AT&T Illinois, Cbeyond is required by the ICA to pay the charges set forth in the parties' ICA. Cbeyond simply has no claim for breach of the ICA.[20]

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would be appropriate to dismiss Cbeyond's allegations concerning the irrelevant ICA provisions in order to "really focus" on the relevant ones.

[18] Schedule 9.2.7 deals with Interoffice Transmission Facilities.

[19] Exhibit 18 contains excerpts of the parties' governing ICA. References to page numbers in Exhibit 18 refer to the numbering in the bottom left-hand corner of each page.

[20] The discussion in this Section specifically references the allegations made with respect to the Category 2 charges. However, this argument applies equally to the Category 1 charges. Thus, if the Commission determines that the Category 1 claims should not be dismissed on the ground that the charges were already addressed (and found to be properly charged) in Docket No. 10-0188, the Category 1 claims should be dismissed for the independent reasons set forth in this Section.

Ignoring these governing provisions of the ICA, Cbeyond focuses on a variety of other provisions that have nothing to do with CCC. *See* Complaint ¶¶ 37; 53 (citing ICA General Terms & Conditions §§ 0.1.19, 1.55; TRO/TRRO Amendment §§ 3.1.2, 3.1.4, 3.1.5, 6.1, 6.2, 6.5; Article 9 §§ 9.1.1, 9.3.3.4, 9.7; ICC June 9, 2004 Order Amendment, Pricing Schedule). Even if these provisions had any relevance to AT&T Illinois' charges for CCC – which, as explained below, they do not – the specific ICA provisions addressing CCC would control over other, more general, provisions. "It is well-established that where a document contains both general and specific provisions relating to the same subject, the specific provision is controlling.'" *Preuter v. State Officers Electoral Bd.*, 334 Ill. App. 3d 979, 991 (1st Dist. 2002) (quoting *Continental Casualty Co. v. Polk Bros., Inc.,* 120 Ill. App. 3d 395, 399 (1st Dist. 1983)). *See also Illinois Bell Telephone Co. v. King City Telephone, LLC*, Docket No. 05-0713, 2006 WL 3950112, at *12 (ICC July 26, 2006) ("Contract law states that where a contract contains general and specific terms, the specific terms control." (citing *Grevas v. United States Fidelity & Guar. Co.*, 152 Ill. 2d 407, 411 (1992))).

The court's decision in *R.W. Dunteman Co. v. Village of Lombard*, 281 Ill. App. 3d 929 (2d Dist. 1996), is instructive. *Dunteman* involved the interpretation of a contract between a construction company, Dunteman, and the Village of Lombard under which Dunteman was to remove and replace a section of road in the village. "A dispute arose as to whether certain work performed by Dunteman was to be compensated at the 'pavement removal' rate provided in the contract or at the 'special excavation' rate, which was the lower of the two rates." *Id.* at 931. The appellate court agreed with the trial court that the higher "pavement removal" rate applied to the work Dunteman performed, finding that the trial court "properly found that an ambiguity existed between the special excavation provisions and the pavement removal provisions, both of

which covered the same type of material," and "then correctly concluded that the specific provisions governing the rate of pay . . . controlled." *Id.* at 936. Likewise, in this case, if there were any ambiguity concerning AT&T Illinois' right to charge Cbeyond for CCC – which there is not – the specific ICA provisions addressing CCC would control over the general ICA provisions cited by Cbeyond.

There is no ambiguity in the ICA, however, because the myriad provisions cited by Cbeyond do not address the application of the CCC rate. Most of the provisions merely require AT&T Illinois to offer certain products and services on "just, reasonable, and non-discriminatory" "rates, terms, and conditions." These general provisions do not specifically address CCC and cannot be used as a basis to invalidate the specific ICA provisions setting forth the availability of, and rate for, CCC. For instance, General Terms & Conditions § 1.55 requires AT&T Illinois to provide UNEs "on an unbundled basis on rates, terms and conditions set forth in this Agreement that are just, reasonable, and non-discriminatory." Ex. 18 at p. 61 of 471. As discussed above, AT&T Illinois provided CCC in accordance with the rates, terms and conditions set forth in the parties' ICA, and the Commission approved that ICA in accordance with federal law. *See also* TRO/TRRO Amendment § 3.1.2, Ex. 18 at p. 422 of 471 (DS1 Loops); TRO/TRRO Amendment § 3.1.4, Ex. 18 at pp. 422-423 of 471 (DS1 Unbundled Dedicated Transport); TRO/TRRO Amendment § 3.1.5, Ex. 18 at p. 423 of 471 (DS3 Unbundled Dedicated Transport); Article 9, § 9.1.1, Ex. 18 at p. 112 of 471 (requiring AT&T Illinois to provide "nondiscriminatory access to Unbundled Network Elements, upon request, at any technically feasible point on just, reasonable and nondiscriminatory rates, terms and conditions to enable CLEC to provision any telecommunications services within the LATA"). This

Commission has already addressed and rejected several of these same provisions in Docket No. 10-0188, and should reach the same conclusion here.[21]

Similarly, Cbeyond cannot find support in any other provisions of the ICA's TRO/TRRO Amendment to support a breach of contract claim. Cbeyond tried this gambit in Docket No. 10-0188 and the Commission rejected Cbeyond's argument. It should do the same here. As Cbeyond did in the prior proceeding, it mischaracterizes the purpose and effect of the TRO/TRRO Amendment, and the *TRO*[22] and *TRRO*[23] decisions by the FCC that led to the TRO/TRRO Amendment. While the *TRO* and *TRRO* decisions and the TRO/TRRO Amendment make reference to "converting" existing circuits, they are all addressing the conversion of "wholesale services (*e.g.*, special access services offered pursuant to interstate tariff) to UNEs or UNE combinations, and the reverse, *i.e.*, converting UNEs or UNE combinations to wholesale." *TRO*, ¶ 587. The *TRO* and *TRRO* decisions, and the TRO/TRRO Amendment, do not address ordering new DS1/DS1 EELs (or changing from one UNE or UNE combination to another UNE or UNE combination, as was at issue in Docket No. 10-0188). That distinction is critically significant and is clearly evident in the *TRO* and *TRRO*.

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[21] As to §§ 3.1.4 and 3.1.5, the Commission in Docket. No. 10-0188 found: "AT&T is alleged to have violated TRO/TRRO Amendment Sections 3.1.4 (DS1 Transport) and 3.1.5 (DS3 Transport), which state that AT&T must provide non-discriminatory access, at Cbeyond's request, to Unbundled Dedicated Transport. *The UDT rules and the ICA sections that give contractual effect to them do not apply to EEL rearrangements*." Ex. 1 at 32 (emphasis added). In regard to § 9.1.1, the Commission considered and rejected the applicability of this provision to Cbeyond's orders for EEL "rearrangements," finding that the two-step process identified by AT&T for EEL "rearrangements" was proper, and that if Cbeyond wished to challenge that process and AT&T Illinois' rates, it should do so in an ICA arbitration. *See* Ex. 1 at 34 ("Cbeyond cites various federal regulations (47 C.F.R. §51.507(e)), ICA sections (ICA Section 9.1.1) and section 251 of TA96 that it believes supports its position that the rates AT&T charges for the two-step process are improper and not TELRIC compliant. If Cbeyond decides to pursue either an arbitration or a generic proceeding, then the Commission would look at what work AT&T is performing and determine what rates should apply for 'rearrangements'."). Thus, for the reasons set forth in Section IV.B.1.b, *supra*, Cbeyond is barred from the collateral attack doctrine from again relying on §§ 3.1.4, 3.1.5 and 9.1.1 to challenge the propriety of the Category 1 charges already considered by the Commission in Docket No. 10-0188.

[22] *Triennial Review Order*, 18 FCC Rcd. 16978 (Sept. 17, 2003) ("*TRO*").

[23] *Triennial Review Remand Oder*, 20 FCC Rcd. 2533 (Feb. 4, 2005) ("*TRRO*").

The Commission agreed with AT&T Illinois in Docket No. 10-0188 and rejected Cbeyond's reliance on section 6.1 of the TRO/TRRO Amendment. In Docket No. 10-0188, the Commission explained:

> [T]he TRO/TRRO Attachment section 6.1 states that "SBC shall provide access to Section 251 UNEs and combinations of Section 251 UNEs without regard to whether a CLEC seeks access to the UNEs to establish a new circuit or to convert an existing circuit from a service to UNEs, provided the rates, terms and conditions under which such Section 251 UNEs are to be provided are included within the CLEC's underlying Agreement". Cbeyond argues that this section of the ICA and the *TRO* require the rearranging of existing EELs. It relies specifically on the term "to convert an existing circuit to UNEs". The Commission does not read it the same way. *An existing circuit is a circuit that was a Cbeyond customer being served through special access tariffs and now will keep the same circuit but pay UNE prices.* If the parties had intended that to "convert an existing circuit" meant to convert an existing EEL, the ICA would say just that, i.e., to "convert an existing EEL". It does not, which leads us to conclude that Cbeyond is mistaken.

Ex. 1 at 32 (emphasis added). The Commission should reach the same result here.[24]

For the same reasons that the Commission rejected Cbeyond's reliance on section 6.1 of the TRO/TRRO Amendment, the Commission should reject Cbeyond's reliance on sections 6.2 and 6.5 of the same amendment. Section 6.2 distinguishes between low-capacity and high-capacity EELs[25] and sets forth certain "Eligibility Criteria" applicable when Cbeyond seeks to purchase high-capacity EELs. Ex. 18 at pp. 431-432 of 471. And section 6.5 states: "Other than the Eligibility Criteria set forth in this Section [6], [AT&T Illinois] shall not impose limitations, restrictions, or requirements on requests for the use of UNEs for the service CLEC seeks to offer." Ex. 18 at p. 435 of 471. There is no allegation in this case that AT&T Illinois is

[24] With respect to reliance on Section 6.1 of the TRO/TRRO Amendment, Cbeyond also is barred by the collateral attack doctrine from using this provision to challenge the Category 1 charges. *See supra* Section IV.B.1.b.

[25] Section 6.2 defines low-capacity EELs as voice grade to DS0 level UNE loops combined with UNE DS1 or DS3 dedicated transport. Such EELs are not even at issue in this case.

imposing any "Eligibility Criteria" on Cbeyond or any "limitations, restrictions, or requirements on" Cbeyond's requests for UNEs. And none of these provisions say anything about, let alone prohibit a CLEC from ordering, CCC as an optional feature, as Cbeyond did here, or about what price is applicable to such an order.

Cbeyond next cites to sections 9.3.3.4 and 9.7 of Article 9 to the ICA, which provide that AT&T Illinois will charge the rates set forth in the Pricing Schedule for UNEs and UNE combinations.[26] That is precisely what AT&T Illinois did here: it charged Cbeyond for CCC at the rate set forth in the parties' ICA.

Finally, Cbeyond cites to the "ICC June 9, 2004 Order Amendment, Pricing Schedule." Cbeyond alleges that "[t]he Pricing Schedule referenced in Article 9, Sections 9.3.3.4 and Section 9.7 was amended by the ICC June 9, 2004 Order Amendment, section 2.1.1, to incorporate the rates from ICC Docket No. 02-0864." Complaint ¶ 37(d). But as Cbeyond must admit, nothing in the ICC's June 9, 2004 Order addresses the application of the CCC rate when the CLEC orders a DS1/DS1 EEL. Although one CLEC (AT&T, prior to its merger with SBC) sought clarification concerning the circumstances under which the CCC rate would apply, the Commission's final order does not address the application of the CCC rate or provide the requested clarification. *See* Complaint ¶¶ 24, 26.[27] Since the June 9, 2004 Order does not address the application of the CCC rate, the amendment implementing that order obviously

[26] *See* Article 9, § 9.3.3.4, Ex. 18 at p. 118 of 471 ("For new UNE combination[s] listed on Table 1, CLEC shall issue appropriate service requests. These requests will be processed by [AT&T Illinois] and [Cbeyond] will be charged pursuant to the Pricing Schedule."); Article 9, § 9.7, Ex. 18 at p. 121 of 471 ("For Unbundled Network Elements defined in this Agreement, and for Combinations listed on Table 1, [AT&T Illinois] shall charge [Cbeyond] the UNE rates specified in the Pricing Schedule.").

[27] The final ICA provision Cbeyond identifies as having been "violated," § 0.1.19 of the General Terms and Conditions, simply contains the definition of "EEL." Ex. 18, p. 419 of 471. This provision certainly can be "pushed away" and dismissed as not providing Cbeyond with a cause of action. Ex. 17 at 10-11.

cannot form the basis of a finding that AT&T Illinois has breached its ICA by charging the wrong rate for CCC.

In summary, Cbeyond's Complaint for breach of the ICA must fail, because it does not identify any ICA provisions that address the question at hand: what is Cbeyond required to pay for CCC when it selects CCC as an optional feature when it orders new DS1/DS1 EELs? That question is answered by reference to § 9.2.7.7.5 of ICA Schedule 9.2.7, which provides that CCC is an "optional feature" available "at an additional cost" when "requested by [a] CLEC." Ex. 18 at p. 295 of 471. *See also id.* at pp. 389, 390, 391 of 471 (original pricing schedule, price for optional CCC), and p. 405 of 471 (02-0864 pricing schedule, price for optional CCC). The 02-0864 Amendment and Pricing Schedule did not change that contract language. To the extent that the general ICA provisions identified in Cbeyond's Complaint have anything to do with CCC – which, as explained above, they do not – they would have to be read in conjunction with, and modified to the extent necessary by, the specific provisions contained in section 9.2.7.7.5 and the Pricing Appendix. *See, e.g.*, *Henderson v. Roadway Express*, 308 Ill. App. 3d 546, 549 (4th Dist. 1999) (specific provision of settlement agreement, which forbid personal injury plaintiff from assigning period payments, controlled over general provision of settlement agreement referring to "assigns"); *Boyd v. Peoria Journal Star, Inc.*, 287 Ill. App. 3d 796, 798 (3d Dist. 1997) ("full effect should be given to more principal and specific clauses, and general clauses should be subject to modification or qualification necessitated by specific clauses"); *American Federation of State County & Mun. Employees v. State Labor Relations Bd.*, 274 Ill. App. 3d 327, 337 (1st Dist. 1995) ("in construing a contract, courts must give effect to the more specific clause and, in so doing, should qualify or reject the more general clause as the specific clause makes necessary").

Because the ICA unambiguously authorizes AT&T Illinois' charges for CCC, the interpretation of that agreement raises a question of law that the Commission may properly address by dismissing the Complaint in full pursuant to section 2-619. *See Matter of Estate of Steward*, 134 Ill. App. 3d 412, 415 (2d Dist. 1985) ("The construction of an unambiguous contract, or the determination of whether a contract is ambiguous, is purely a question of law."); *Popp*, 313 Ill. App. 3d at 641 (explaining that a section 2-619 motion may be used "to dispose of issues of law"). Even if the Commission were to determine that some of the provisions relied on by Cbeyond are relevant (which they are not), the Commission should dismiss the allegations concerning the irrelevant ICA provisions so that the parties and the Commission can "really focus" on the provisions that control the resolution of this dispute. Ex. 17 at 10-11.

V.
Section 2-615 Motion to Dismiss

A. Standard of Review

A motion to dismiss under section 2-615 of the Code of Civil Procedure attacks the sufficiency of a complaint and raises the question of whether the complaint states a claim upon which relief can be granted. *Beahringer v. Page*, 204 Ill. 2d 363, 369 (2003). *See also* 735 ILCS 5/2-615. "Illinois is a fact-pleading jurisdiction that requires a plaintiff to present a legally and factually sufficient complaint," meaning that the plaintiff "must allege sufficient facts to state all the elements of the asserted cause of action." *Vill. Of Bensenville v. City of Chicago*, 389 Ill. App. 3d 446, 486-87 (2d Dist. 2009). The plaintiff "cannot rely simply on mere conclusions of law or fact unsupported by specific factual allegations." *Jackson v. South Holland Dodge, Inc.*, 197 Ill. 2d 39, 52 (2001).

B. Argument

1. Counts One, Two and Three of the Complaint Should Be Dismissed Because Cbeyond Did Not Revise Those Counts To Comply With The ALJ's August 31, 2012 Ruling Granting Leave to Amend.

In the August 31 ruling, the ALJ dismissed Counts One, Two and Three of Cbeyond's amended complaint, with leave to amend, because the pleadings did not allege sufficient information on which to determine whether those claims were legally sufficient. 8/31/12 ALJ Ruling at 6. Specifically, at the hearing announcing her ruling, the ALJ stated that she "need[s] to know what statutory elements are involved in th[ese] statutes and how that relates to Cbeyond." Ex. 14 at 22. Cbeyond, as the complainant in this case, bears the burden of proof on all of its claims. *See, e.g.*, *Valerie Saunders Davis v. Commonwealth Edison Company*, Docket No. 11-0416, 2012 WL 605992, ¶ 10 of Commission Analysis and Conclusions (ICC Feb. 16, 2012) (slip op.) ("the Complainant has the burden of proof").

Despite its burden, and despite the ALJ's clear direction, in its new Complaint Cbeyond has not made any revisions to Counts One, Two or Three to elucidate its claims. As far as AT&T Illinois can tell from comparing the first amended complaint with the Second Amended Complaint, the *only* change Cbeyond made in the bodies of those claims was to update the paragraph numbering. Although Cbeyond made some revisions to the prefatory numbered paragraphs, which it incorporates by reference, those revisions do not discuss or even mention section 13-514, section 13-801, or section 9-250. Because Cbeyond's "amendments did not 'cure' the defects" set forth in the ALJ's ruling, Counts One, Two, and Three of the Complaint should be dismissed. *Joseph Const. Co. v. Board of Trustees of Governors State University*, 973 N.E.2d 486, 498 (Ill. App. 3d Dist. 2012) (denial of leave to amend proper where proposed amendment did not cure defects).

2. Count Two Of Cbeyond's Complaint Also Should Be Dismissed Because It Fails To Allege That AT&T Illinois Has Engaged In Any Conduct Addressed By Section 13-801 Of The PUA.

In Count Two of its Complaint, Cbeyond alleges that AT&T Illinois violated section 13-801(g) of the PUA, which provides that "[i]nterconnection, collocation, network elements, and operations support systems shall be provided by the incumbent local exchange carrier to requesting telecommunications carriers at cost based rates." 220 ILCS 5/13-801(g). *See* Complaint ¶¶ 43-47. Cbeyond does not allege, however, that the CCC rates AT&T Illinois has imposed on Cbeyond are anything other than "cost-based" rates. Indeed, in its latest Complaint, Cbeyond continues to allege that the cost-based rate for CCC was established in Docket No. 02-0864. *See id.* ¶ 9. Instead, Cbeyond's Complaint challenges whether the CCC rate should be applied at all when Cbeyond purchases a DS1 or requests the "rearrangement" of a DS1 EEL. *See id.* ¶ 45. Whether a particular rate element is applicable to a particular service – which is the question raised by Cbeyond's Complaint – is an entirely separate issue that § 13-801 does not cover. Moreover, as Cbeyond has no choice but to admit, the final order in Docket No. 02-0864 "did not address" a CLEC's request that the Commission clarify that the CCC rate element applies only to rearrangement of existing DS1 circuits. *Id.* ¶¶ 24, 26. Simply put, the facts of this case do not fit within the statute, and therefore Count Two fails to state a claim for violation of § 13-801 and should be dismissed.

VI.
Conclusion

For the reasons explained above, Cbeyond's Second Amended Complaint should be dismissed in full.

Dated: November 2, 2012

Respectfully Submitted,

AT&T Illinois

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CERTIFICATE OF SERVICE

I, Nissa J. Imbrock, an attorney, certify that a copy of the foregoing AT&T ILLINOIS' COMBINED SECTION 2-619.1 MOTION TO DISMISS CBEYOND'S SECOND AMENDED VERIFIED FORMAL COMPLAINT was served on the following Service List via U.S. Mail and/or electronic transmission on November 2, 2012.

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